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THE LEAGUE OF NATIONS AND THE CONSTITUTION

THE Covenant for a League of Nations has justly aroused an immense amount of discussion in this country, since it undoubtedly presents to the American nation the most important of the many questions of foreign policy growing out of the Great War. Most of this discussion has dealt with the matter solely from the standpoint of policy or expediency, without noticing the interesting constitutional questions involved. When the Covenant has, on occasion, been considered from the constitutional point of view, such consideration has generally been merely incidental and the writer's or speaker's views as to the desirability of subscribing to the Covenant have too frequently and perhaps unconsciously colored his conclusions as to its constitutionality. In this paper an attempt is made to discuss the constitutional issues involved, but without expressing any opinion as to the advisability of the United States becoming a member of the League.

Since the Covenant is a treaty or part of a treaty, the question as to whether it is constitutional or not naturally depends upon the answer to the further question as to whether it is within the competence of the treaty-making body to bind the United States to such an agreement. The first question of a constitutional nature which has been raised in reference to the Covenant is aimed at the method which has been pursued in negotiating the treaty, rather than at the provisions of the Covenant itself. It has been alleged that the President failed to consult the Senate before laying before that body the completed draft for its approval, and that the treaty has therefore not been made with the advice of the Senate, as contemplated by the Constitution.¹ It is doubtless true that the Constitution framers intended that there should be close co-operation between the President and the Senate during the course of the negotiations, as the Senate was expected to be primarily an executive council for the President. Since treaties become, however, when proclaimed by the President, a part of the law of the land, the Senate has acted on the theory that, in advising and consenting to their ratification, it is acting in its representative capacity, rather than as an executive council. It is true that President Washington consulted the Senate in person in regard to a proposed treaty, but the Senate insisted on referring the proposal to a committee for consideration, where the President would not be present, and Wash-

¹ C. A. HERESHOFF BARTLETT, "THE CONSTITUTION OF THE LEAGUE OF NATIONS; WHICH?" 53 AMERICAN LAW REVIEW, 527-530.

ington declared that this defeated every purpose of his coming there.² There have also been later instances where the President has taken the Senate into his confidence during the course of negotiations, but it is now well established that the President may or may not do so, depending on his own views of expediency. The Senate may, on this account, fail to act favorably on the treaty, but it might, of course, take the same action, even if it had been consulted. The Senate has no right to demand of the President information relating to the negotiations connected with a pending treaty, and, when making requests for such information, stipulates that it be furnished, "if not incompatible with the public interests," which leaves full discretion in the hands of the President.³ Failure of the President, therefore, to consult the Senate or to furnish that body with information during negotiations in no way affects the validity of the treaty if the Senate duly advises and consents to its ratification.

Another constitutional objection which has been made to the method of negotiating the treaty for the League of Nations is that it has been made a part of the treaty of peace, and the two parts have been so "inextricably intertwined" that the Senate, in order to secure peace, is practically forced to consent to the ratification of both parts, regardless of its judgment as to whether it is expedient to subscribe to that part dealing with the League. By adopting this method, the President, it is alleged, comes into absolute control of the treaty-making power, the Senate is coerced into consenting to ratification against its will, its free judgment in the matter which the Constitution intended it to exercise is nullified, and the constitutional division of power between the President and the Senate in treaty making is effaced.⁴ It is true that the President can create conditions and shape events in such manner as practically to deprive the Senate of free judgment. But all this is involved in the President's power of negotiation, just as the President, in the conduct of foreign relations, may bring about conditions which practically compel Congress to declare war. Similarly, Congress, on its side, may turn the tables by attaching riders to appropriation bills, which the President may be practically compelled to sign, or to allow to become a law, against his better judgment. In none of these cases, however, does the prior action of one branch of the government preclude the other from

² MACLAY'S JOURNAL, p. 131.

³ This, of course, is a different question from that as to what information the President should furnish the Senate when he submits to it the completed draft of the proposed treaty.

⁴ Cf. D. J. HILL, "PRESENT PROBLEMS IN FOREIGN POLICY," pp. 162-3.

exercising complete legal freedom of action. This, therefore, is a matter, not of law, but of politics.

It appears, then, that no constitutional objections arise in connection with the process and manner of negotiating the treaty containing the Covenant. The contention of unconstitutionality, therefore, if sustained, must be based upon an alleged conflict between the Constitution and the provisions of the Covenant itself.

It is obvious that many of the provisions of the Covenant are merely advisory in character and place upon the contractuaries merely moral obligations, even in the international sense. On this account no constitutional questions would arise in connection with them, and, for the purposes of this paper, they may be omitted from consideration. There are other provisions, however, about which, on account of the limitations of human language if for no other reason, doubts may be entertained as to their meaning and interpretation in reference to the character of the obligation incurred under them. On this account disputes may arise between this country and other members of the League as to the interpretation of the treaty. Provision is made in Articles XIII and XV for the settlement of disputes between members either by arbitration or by submission to the League Council, and disputes as to the interpretation of a treaty are specifically mentioned as suitable for submission to arbitration. On the other hand, our Constitution provides that the judicial power vested in the courts of the United States shall extend to all cases in law and equity arising under treaties made under their authority, and, in exercising such power, it may become necessary for the courts to interpret the meaning of treaties in applying their provisions to cases brought before them. Have we here a conflict between the Constitution and the Covenant? If so, then it was unconstitutional for the United States to enter into the numerous treaties in which we undertook to submit, by special agreement, to the permanent court of arbitration at The Hague international differences which might arise of a legal nature or relating to the interpretation of treaties existing between the contractuaries.⁵ Further to answer this question, it should be borne in mind that a treaty of the United States may be considered from two points of view, first, as a part of the municipal law of the land, and, secondly, as an international contract. This is a distinction which is frequently overlooked, but which is fundamental to any adequate consideration of the question before us. The courts construe treaties as laws when they are self-executory and private rights are involved, but they have

⁵ See, *e. g.*, 35 U. S. Stat. at L., 1904.

no jurisdiction to settle disputes between the contracting parties. From the standpoint of contract, when an allegation of non-performance gives rise to a dispute between the contractuaries as to the interpretation of the contract, this is a political question and, not being suitable for submission to the national courts of either party, is reserved for settlement by arbitration or by submission to the League Council.

Although treaties, under the Constitution, are a part of the supreme law of the land, and although that instrument declares that the judicial power of the United States shall extend to all cases arising under treaties made under their authority, this is true only in so far as such treaties are self-executory.⁶ Where, through the treaty-making power, a contract is entered into with the foreign government to perform certain acts requiring supplementary legislation or to refrain from performing certain acts, the enforcement of such a stipulation is naturally dependent upon the action, non-action, or limited action of the legislative department and no judicial question is directly presented. Thus, as the Supreme Court declared in an early case, a treaty "is to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."⁷ Similarly, it follows that where the treaty contains a contractual provision whereby it is agreed that certain action shall or shall not be taken by the executive department of our government, no judicial question is directly presented, regardless as to whether such action is, or is not, taken by the executive.

If we examine the text of the Covenant, we find many such contractual provisions in which it is agreed that future or supplemental action shall be taken by the legislative or executive departments of our government, and others where the government is bound not to take certain action which it would otherwise be free to take. It is believed, however, that there is no provision in the Covenant requiring supplementary action by the legislative or executive departments of our government which those departments would not be constitutionally competent to perform even in the absence of a treaty; while, moreover, it is well established that the power of Congress to pass

⁶ *Turner v. American Baptist Union*, Fed. Cas. No. 14,251.

⁷ *Foster and Elam v. Neilson*, 2 Pet., 314 (1829).

legislation for the enforcement of treaties is broader than its ordinary legislative power.⁸ Therefore, if such acts are passed, no case could be made out against their constitutionality, while, on the other hand, if such acts are not passed, such non-action on our part might give rise to the accusation of bad faith by other nations, but no question would arise in our courts.

It might be supposed that, due to the predominantly contractual character of the Covenant, it would be difficult if not impossible to bring its provisions before the courts for construction, since they present political rather than judicial questions. But, even though no citizen were allowed a standing in court for the purpose of suing to enjoin the expenditure of public funds to pay the salaries of our representatives in the organs of the League or our share of the expenses of the Secretariat, it would be rash to affirm that no question as to the constitutionality of the Covenant could arise in the courts in a collateral, if not direct, proceeding. No case is known where a treaty has been declared unconstitutional, though the courts have refused to apply treaties when in conflict with later acts of Congress, but the international obligation involved was not thereby affected. It may be admitted that a treaty provision may be unconstitutional, even though incapable of being so decided by the courts. But, in such case, who is to judge unless it be the treaty-making body itself? And does not the action of that body in negotiating and consenting to the ratification of the treaty obviously imply that, in the opinion of such body, the treaty is constitutional? Moreover, it is reasonable to assume that treaties are entitled to the same presumption in favor of their constitutionality as is accorded by the courts to acts of Congress. In fact, this presumption is even stronger in the case of treaties since the powers of Congress are enumerated, while those of the treaty-making body are not enumerated but granted in broad terms. In other words, it is not to be presumed that the treaty-making body would undertake to make a treaty which is in excess of its powers under the Constitution, and it is not, therefore, to be presumed that a treaty is unconstitutional until so decided by competent authority.

The Supreme Court of the United States has declared it to be clear that "the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations." Although the treaty-making power

⁸ Congress must have the power to pass the necessary legislation to enforce a valid treaty, even though in the absence of such treaty Congress would have no such power, for, otherwise, the treaty-making power would, in many cases, be rendered virtually nugatory.

does not extend so far as to authorize what the Constitution forbids or a change in the character of the government, or in that of one of the states, it is not perceived, said the court, that, with these exceptions, "there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."⁹ In the course of the development of the relations between nations, a matter which was not formerly a proper subject of international negotiation may become so with the progressive increase in the intimacy of contact and intercourse between nations. Therefore, even if the Covenant were entirely unprecedented in all its features, it would not necessarily follow that the treaty-making power is incompetent to deal with it. If, on the other hand, it can be shown that precedents exist in previous international agreements into which the United States has entered for most of the important provisions of the Covenant, the presumption in favor of its constitutionality will be greatly strengthened.

In Article VI of the Covenant it is provided that the expenses of the Secretariat shall be borne by the members of the League in accordance with a designated rule of apportionment. It is obvious that this provision implies that Congress shall make an appropriation for its execution. The Constitution provides that no money shall be drawn from the treasury except in consequence of appropriations made by law. Since treaties are declared by that instrument to be laws, it might be supposed at first sight that money might be appropriated by treaty. But the Constitution also requires that all bills for raising revenue shall originate in the House of Representatives, and, by custom, this special privilege of the House has been enlarged so as to include also bills to appropriate money. Consequently, money cannot be appropriated by the treaty-making body, but only by a law enacted with the concurrence of both branches of the legislature. Congress must therefore act in order that this provision of the treaty may be carried into execution. But this is nothing new. As is well known, there have been numerous treaties, from Jay's treaty down to the present time, which have required for their enforcement the appropriation of money by act of Congress. Although the House of Representatives has asserted its right to exercise its own discretion as to whether it shall make such appropriation, it is believed that it has never refused to take the necessary action to provide means for the enforcement of a treaty.

In Article X of the Covenant the contractuaries undertake to respect and preserve as against external aggression the territorial

⁹ *De Geofroy v. Riggs*, 133 U. S., 267.

integrity and existing political independence of all the members of the League. It is further stipulated that, in case of any such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled. By Article XI any war or threat of war is declared to be matter of concern to the whole League, and "the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations." It has been alleged that, by these articles, the Covenant attempts to transfer the power to declare war from Congress to the Council of the League, in defiance of the Constitution.¹⁰ But the action to be taken by the Council in case of war or threat of war may reasonably be construed to mean no more than the adoption of recommendations to the contractuaries that war be declared against any peace-breaking power. Further, under the circumstances mentioned in Article X, the Council might advise a declaration of war, but since the nature of advice is such that it need not be accepted, the members of the League would be under no legal obligation, even in the international sense, to accept such advice. Since, however, the contractuaries undertake to preserve their mutual independence and territorial integrity, they would be under a legal obligation, in the international sense, to take such action as would reasonably be conducive to the accomplishment of these ends.

By Article XVI it is provided that "should any member of the League resort to war in disregard of its covenants * * * it shall *ipso facto* be deemed to have committed an act of war against all other members of the League." This provision, says Judge A. S. Van Valkenburg, "contemplates that we may automatically be placed in a state of war against some other nation without the action of Congress, to which is confided (by the Constitution) the exclusive power of determination."¹¹ This argument overlooks the fact that, even from the standpoint of our municipal law, the United States may be placed in a state of war through the offensive warlike acts of another power and without any action on the part of Congress.¹² Article XVI merely recognizes the fact that the United States can no longer remain indifferent to an invasion of the peace of the world, even though we may not be immediately or directly attacked.

It is by no means unprecedented for the treaty-making body to bind the nation to go to war or to take warlike action under certain circumstances. Thus, by the Webster-Ashburton treaty of 1842, we agreed with Great Britain to maintain a naval force on the coast of

¹⁰ See, e. g., C. A. HERESHOFF BARTLETT, *loc. cit.*, pp. 514-5.

¹¹ Address reprinted in the CONGRESSIONAL RECORD, vol. 58, p. 146.

¹² Cf. *Prize Cases*, 2 Black, 635.

Africa for the suppression of the slave trade.¹³ Under our treaty of 1846 with New Granada (Colombia) we guaranteed the "perfect neutrality" of the Isthmus of Panama,¹⁴ and we entered into a similar covenant with Great Britain respecting the Isthmian canal by the Clayton-Bulwer treaty of 1850.¹⁵ Through our treaty of 1904 with Panama, we undertook to guarantee and maintain the independence of that republic,¹⁶ and, at about the same time, we extended by implication the same guarantee to Cuba.¹⁷ These treaty provisions do not go so far as to require a declaration of war, but they almost necessarily imply intervention or warlike measures on our part in case the independence or neutrality guaranteed is threatened or in imminent danger.

In Article XVI the members of the League also agree, under certain circumstances, to sever trade relations with a member resorting to war in violation of its obligations under the Covenant. It is urged that this provision infringes upon the well-established power of Congress to place embargoes upon the export of goods to certain countries. But many treaties have been entered into dealing with embargoes or involving a modification of the revenue laws. Thus, by our treaty of 1795 with Spain, it was agreed that "the subjects or citizens of each of the contracting parties, their vessels or effects, shall not be liable to any embargo or detention on the part of the other."¹⁸ If such treaties are unconstitutional, then, in the language of Calhoun, "its (the treaty-making power's) exercise has been one continual series of habitual and uninterrupted infringements of the Constitution."¹⁹ It may be true that the treaty-making body cannot of itself repeal existing revenue acts, but there is no doubt of its competence to bind the government, in an international sense, with reference to the imposition of custom duties, even though Congressional action may be necessary to carry out the agreement. If the treaty-making power can provide against the imposition of embargoes, there is no difference in principle in adopting by treaty an agreement for establishing an embargo or international economic boycott in a certain contingency.

It has been argued that the necessity for Congressional legislation to execute the obligations of a treaty is an important limita-

¹³ W. M. MALLOY, *TREATIES, CONVENTIONS, ETC.*, p. 655.

¹⁴ MALLOY, *op. cit.*, p. 312.

¹⁵ *Ibid.*, p. 661.

¹⁶ *Ibid.*, p. 1349.

¹⁷ *Ibid.*, p. 364.

¹⁸ *Ibid.*, p. 1643.

¹⁹ J. B. MOORE, *DIGEST OF INTERNATIONAL LAW*, vol. V, p. 164.

tion upon the treaty-making power.²⁰ This is a misconception which arises from a failure to distinguish between the international and constitutional aspects of treaties. Such an argument confuses the question of the validity of a treaty with that of its execution. It is too well established to admit of question that the powers of the treaty-making body may overlap with those of Congress, operating upon the same objects. The treaty-making power, if exercised with reference to a matter which is properly the subject of negotiation with a foreign country, can bind our government fully in an international sense, though the action of other departments of the government may still be necessary to execute the treaty. When by treaty we bind ourselves to take some action which, under the Constitution, can be taken only by Congress, it is no objection to say that, in such case, the action of Congress is merely perfunctory, so that it is deprived of its discretion to act in accordance with its own wishes when the occasion arises. This may practically be true, for, in an international sense, Congress may be placed under a moral or political obligation to act in a certain way at a future time, but from the constitutional point of view, Congress is still in possession of complete legal freedom to act in accordance with its own discretion. Congress cannot abrogate the international obligation incurred, but it can constitutionally annul the treaty. Speaking of this distinction, ex-President Taft declares that "the suggestion that, in order to carry out such an obligation (to declare war) on the part of the United States, it would be necessary to amend the Constitution, grows out of a confusion of ideas and a failure to analyze the differences between the creation of an obligation of the United States to do a thing and the due, orderly, and constitutional course to be taken by it in doing that which it has agreed to do."²¹

Some of the provisions of the Covenant contemplate the creation of an international obligation not to take certain action or to take only limited action in reference to certain matters. Thus, by Article VIII, after the adoption by the several governments of the plans formulated by the Council for the reduction of armaments, they agree not to exceed such limits without the concurrence of the Council. By Article XII the contractuaries agree not to resort to war until three months after the award by the arbitrators or the report of the Council, and by Article XV they agree not to go to war with any party to the dispute which complies with the recommendations of the Council's report. These provisions undertake to

²⁰ D. J. HILL, "PRESENT PROBLEMS IN FOREIGN POLICY," p. 164.

²¹ ENFORCED PEACE, p. 67.

place a limit, in an international sense, upon the full discretion of Congress granted to it in the Constitution to declare war, raise and support armies, and provide and maintain a navy. If, however, the treaty-making power can bind the United States internationally to take certain action requiring for its completion the consent and supplementary action of other branches of the government, it is not perceived that there is any real difference in principle in exercising the same power to bind our government internationally not to take certain action or to take only limited action in certain directions. We have hitherto entered into treaties by which a limitation is attempted to be placed upon the exercise by Congress of its power to declare war. Thus, under the so-termed Bryan peace treaties, the United States agreed with a number of powers not to go to war with the other contracting party pending investigation of the dispute by an international commission.²² Furthermore, by the Rush-Bagot agreement between the United States and Great Britain in 1817, the two powers undertook mutually to limit the extent of their naval armaments on the Great Lakes.²³ Although this agreement was at first a mere exchange of notes, it subsequently became a full-fledged treaty through the advice and consent of the Senate to its ratification. It is true, however, that it did not contemplate such a general reduction or limitation of armaments as is provided by Article VIII of the Covenant, but it did place a limit internationally upon the power of Congress to provide for the construction of warships upon a designated portion of our coastline.

Under Article XX, the contractuaries undertake that they will not hereafter enter into any engagements inconsistent with the terms of the Covenant, and by Article XVIII, it is declared that no treaty entered into hereafter by the members of the League shall be binding unless registered with the secretariat. These provisions have been attacked as placing an unconstitutional limitation upon, and delegation of, the treaty-making power of the United States. But if, as above pointed out, the treaty-making body can enter into engagements which place limits, in an international sense, upon the powers of Congress, no reason is perceived why, in the same sense, it may not place limits upon itself. Article XVIII constitutes a conditional self-limitation upon the binding force of international engagements entered into by the treaty-making body, but places no constitutional limitation upon the treaty-making power not already existing.

With reference to the matter of mandatories provided for in

²² See, *e. g.*, 38 U. S. Stat. at L., 1853.

²³ MALLOY, *op. cit.* p. 629.

Article XXII, two constitutional questions may be raised, first, as to the power of the United States to act as a mandatory for any backward country. This question is settled by the provision inserted in the revised draft of the Covenant leaving it to the voluntary action of each power as to whether it shall undertake to act as a mandatory or not. So that the constitutional question would arise, not upon the adoption of the treaty containing the Covenant, but upon a proposal subsequently made to this country to act as a mandatory in any particular case. The second question is as to whether the United States could constitutionally participate through membership in the Council in defining the degree of authority to be exercised by the mandatory power over the backward country. This, however, would seem to be a lesser stretch of the treaty-making power than the bringing of a foreign territory under the sovereignty of the United States, which, it was established in the insular cases, can be done through the exercise of such power. Nor would it seem to be any greater stretch than was exerted in the treaty or general act of 1889 between the United States, Great Britain, and Germany, providing for the joint nomination by the three powers of a chief justice of Samoa and a president of the municipal council of Apia, defining their powers and making provision for the payment of their salaries.²⁴ The working of this agreement was unsatisfactory, but that fact does not affect the constitutionality of entering into it.

Finally, the Covenant has been attacked, not because of any particular provisions, but because, taking it by and large, it establishes a super-government over the contracting parties.²⁵ To call the League of Nations a super-government is a misuse of terms. An organization which has no army of its own and no power of securing funds by taxing individuals, but is dependent upon its constituent members to supply these essential requisites of a real government, can hardly with propriety be called a super-government. It is rather an agency of the constituent members for accomplishing certain common purposes. The organs of the League are not so much representative assemblies as they are congresses of ambassadors of sovereign states. There is therefore no real analogy between the creation of the League of Nations and the formation of the United States Government under the Constitution of 1787. That government derived its authority from the people of the United States and had within its own control all the powers of government necessary for its maintenance and self-preservation, while the

²⁴ MALLOY, *op. cit.*, p. 1576.

²⁵ D. J. HILL, *op. cit.*, p. 112.

League of Nations has no dealings except with states and has no powers except those granted to it by the contractuaries. Its effectiveness will depend not so much upon the exercise of physical force as upon the mutual respect of its members and their loyal and spontaneous support of the principles of the League.

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